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JUN 17 2011
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

In re the Marriage of:	)	
	)	2 CA-CV 2010-0199
YEKATERINA SHTYRKOVA,	)	DEPARTMENT A
	)	
Petitioner/Appellee,	)	MEMORANDUM DECISION
	)	Not for Publication
v.	)	Rule 28, Rules of Civil
	)	Appellate Procedure
DENIS A. GORBUNOV,	)	
	)	
Respondent/Appellant.	)	
	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. SP20060852

Honorable Margaret L. Maxwell, Judge Pro Tempore

AFFIRMED

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B R A M M E R, Presiding Judge.

¶1 Denis Gorbunov appeals the trial court's order granting Yekaterina Shtyrkova's motion to modify parenting time of their minor child, D., and her petition for

relocation. Gorbunov argues the court erred in determining the prior custody agreement reached between him and Shtyrkova was no longer in D.'s best interests and in applying the provisions of A.R.S. § 25-408(H) to determine relocation was in D.'s best interests. He also argues public policy reasons favor enforcing the parties' prior agreement regarding parenting time and relocation. We affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to upholding the trial court's ruling. *See Little v. Little*, 193 Ariz. 518, ¶ 5, 975 P.2d 108, 110 (1999). Shtyrkova and Gorbunov entered into a parental custody agreement in 2008. The agreement stipulated D. would spend the 2009 fall school semester in New Mexico with Shtyrkova while she worked at a new job and the 2010 spring semester in Tucson with Gorbunov. The agreement also provided that after Shtyrkova's work ended in approximately June 2010 she and D. would move back to Tucson and D. would reside in Tucson for at least one year.

¶3 Before her New Mexico work ended, Shtyrkova was accepted to a doctoral program at the Massachusetts Institute of Technology (MIT). She filed a petition in May 2010 asking the trial court to modify the extant agreement to allow her and D. to move to Cambridge, Massachusetts in summer 2010. The court granted the petition and also ruled that D. was to spend the fall 2010 school semester with her and the spring 2011 semester with Gorbunov. Furthermore, D. was to spend the first half of the 2011 summer with Shtyrkova in Massachusetts and the second half in Tucson with Gorbunov.

¶4 Gorbunov filed a motion to amend the trial court's ruling, asking it to make specific findings as to whether the 2008 agreement was no longer in the best interests of D. and whether Shtyrkova had rebutted the presumption that the provisions of that agreement prohibiting relocation was in D.'s best interests. The court amended its ruling and found Shtyrkova's acceptance into the MIT program was both unforeseen and a substantial and continuing change of circumstances that warranted a reconsideration of custody, the 2008 agreement was no longer in D.'s best interests, and the proposed relocation was in D.'s best interests. This appeal followed.[1]

Discussion

¶5 Gorbunov argues the trial court erred in applying A.R.S. § 25-408(H) and in finding the agreement previously entered into between him and Shtyrkova was no longer in D.'s best interests. We review a court's custody and parenting-time decisions for an abuse of discretion. *Owen v. Blackhawk*, 206 Ariz. 418, ¶ 7, 79 P.3d 667, 669 (App. 2003).

¶6 Section 25-408(H) provides as follows:

> The court shall not deviate from a provision of any parenting plan or other written agreement by which the parents specifically have agreed to allow or prohibit relocation of the child unless the court finds that the provision is no longer in the child's best interests. There is a rebuttable presumption that a provision from any parenting plan or other written agreement is in the child's best interests.

[1]Shtyrkova contends the appeal should be dismissed as moot because Gorbunov's argument relies on portions of the 2008 agreement that will expire after June 2011. However, because the challenged order remains in effect and contains provisions extending until August 15, 2011, we address the merits of the appeal.

Section 25-408(I) further provides that in determining the child's best interests, the court is to "consider all relevant factors," including those specified in A.R.S. § 25-403 and other specific factors relating to the proposed relocation.

¶7 Gorbunov asserts "[t]he factual bases for the trial court's determination regarding the previous agreement were incorrect" and should not have been used as a basis for its ruling because Shtyrkova's acceptance into the MIT program was within her control and because she stated she would not relocate if the court did not grant her petition. Relying on *Owen*, 206 Ariz. 418, ¶¶ 15-16, 79 P.3d at 671, Gorbunov contends there are no grounds for a change in custody in the face of evidence the parent would not relocate if the petition for relocation is denied.

¶8 In *Owen*, Division One of this court determined the trial court had abused its discretion in altering custody after it denied the mother's petition to relocate because she testified she would not move if the petition was not granted; therefore, after the petition was denied, there was no change in circumstances justifying a change in custody. *Id.* ¶¶ 5, 15-16. *Owen* does not hold a court cannot find a change in circumstances, or cannot find an agreement no longer is in the child's best interests, if there is evidence the petitioning parent will not move if the petition for relocation is denied. Accordingly, it does not support Gorbunov's position. Moreover, we find no support for the proposition that a petition for relocation can be granted only if the parent commits to relocate regardless of the court's decision.

¶9 Gorbunov does not argue there was no basis for the trial court's findings, only that those findings "should not have been a basis" for determining the prior

agreement was no longer in D.'s best interests. He has not cited any authority, other than *Owen*, supporting that proposition, and we find none. We also find no support for Gorbunov's suggestion that the change in circumstances warranting a change in custody must be outside the control of the petitioning parent. *See* Ariz. R. Civ. App. P. 13(a)(6) (argument shall contain citation to authority relied on). Moreover, there is substantial support in the record to rebut the presumption arising under § 25-408(H) regarding the continuing vitality of the prior agreement, including testimony about the unique opportunity afforded Shtyrkova by the MIT program and the need for D. to continue having parenting time with both parents. *See Hurd v. Hurd*, 223 Ariz. 48, ¶ 16, 219 P.3d 258, 262 (App. 2009) (we affirm trial court's ruling if substantial evidence supports it). Therefore, we cannot say the court abused its discretion in determining the prior agreement was no longer in D.'s best interests.

¶10 Gorbunov also alleges the trial court erred in determining relocation was in D.'s best interests. He contends only one factor under §§ 25-403 and 25-408 the court noted supported relocation—Shtyrkova's increased employment prospects—and that "[i]n all other respects, the court found that the parents had enjoyed equal parenting time with [D.] that should be continued." In criticizing its decision to split parenting time equally over the course of the year instead of in regular intervals, Gorbunov argues the court gave "little consideration" to the impact on D. of that arrangement. He asserts the court failed to consider "on the record" challenges D. may face spending each school semester in different locations.

¶11 As it was required to do, the trial court addressed all relevant factors in §§ 25-408(I) and 25-403. In contrast to Gorbunov's suggestion, the court found multiple factors supporting relocation, including that relocation likely will improve D.'s quality of life, that Shtyrkova is likely to cooperate with the long-distance parenting time schedule, that Gorbunov still would have a realistic opportunity for in-person parenting time, and that D.'s developmental needs "would not necessarily be affected" by the relocation. And the court addressed the likely impact on D. from splitting parenting time in the manner prescribed, noting that over the past year D. had done well "when he had longer periods of residence with each parent as opposed to a more choppy weekly exchange of parenting time," as demonstrated by a positive change in his behavioral problems accompanying the move to New Mexico.

¶12 The trial court's findings establish it considered and weighed the evidence presented and addressed the factors required by § 25-408(I) before granting the petition for relocation. And, although Gorbunov asserts "there is evidence supporting the court's decision" and "evidence weighing against it," this court will not reweigh evidence or redetermine the preponderance of the evidence.[2] *See Hurd*, 223 Ariz. 48, ¶ 16, 219 P.3d at 262 ("due regard" given to trial court's ability to judge credibility of witnesses). "Even though conflicting evidence may exist, we affirm the trial court's ruling if substantial

[2]To the extent Gorbunov relies on *Hurd*, it is inapposite. Although the court there noted both evidence supporting the trial court's relocation decision and evidence weighing against it, "[w]ithout commenting on the merits," the court vacated the relocation order and remanded the case to the trial court, which had abused its discretion by failing to make the required findings addressing the relevant statutory factors. *Hurd*, 223 Ariz. 48, ¶ 26, 219 P.3d at 264. Here, the court addressed all factors required by §§ 25-408(I) and 25-403.

evidence supports it." *Id.* We conclude substantial evidence was presented from which the court could find relocation was in D.'s best interests. *See* § 25-408(G) ("court shall determine whether to allow the parent to relocate the child in accordance with the child's best interests"). Therefore, we cannot say the court abused its discretion in reaching that determination.[3]

¶13 Gorbunov also argues the trial court's ruling violates public policy by abrogating the parties' previous agreement. Relying on *Kelly v. Kelly*, 160 Ariz. 487, 774 P.2d 226 (App. 1989), he contends there is "a strong interest in the finality of family law agreements, as it allows the parties to move on with their lives." However, *Kelly* stated more precisely that "'[t]here is a compelling policy interest favoring the finality of property settlements . . . so that the parties may get on with their lives and conduct their financial and personal affairs accordingly." *Id.* at 489, 774 P.2d at 228, *quoting Reed v. Reed*, 124 Ariz. 384, 385, 604 P.2d 648, 649 (App. 1979). The interests affecting resolution of property disputes do not dictate the proper outcome of a request to relocate a child because unique public policy interests control child custody and visitation arrangements. Specifically, Arizona's public policy requires the best interests of the child be the primary consideration in custody decisions. *Downs v. Scheffler*, 206 Ariz. 496, ¶ 7, 80 P.3d 775, 778 (App. 2003). Section 25-408(H) makes the primacy of this policy interest explicit in relocation decisions by allowing the court to deviate from a

[3]Gorbunov also argues the court did not "make any provisions for [D.'s] living and education arrangements in subsequent years." However, the court's ruling explicitly set a date and time for the next review hearing "to determine the most appropriate parenting time schedule" for the next school year.

previous agreement between parents when it finds the agreement is no longer in the child's best interests, implicitly acknowledging that what is in the child's best interests may change over time.

¶14 Gorbunov argues the trial court's ruling leaves him with "absolutely no incentive . . . to negotiate a parenting plan, knowing that any agreement he enters into may be changed at the whim of [Shtyrkova]." However, § 25-408(G)-(I) requires the parent seeking relocation to prove the change is in the best interests of the child. Contrary to Gorbunov's suggestion, Shtyrkova may not relocate D. without sustaining that burden, and the statute's requirement that the determination be controlled by the best interests of the child conforms to Arizona's settled public policy. *See Downs*, 206 Ariz. 496, ¶ 7, 80 P.3d at 778.

Disposition

¶15 For the foregoing reasons, we affirm. Both parties request an award of attorney fees on appeal pursuant to A.R.S. § 25-324. In our discretion, we deny both requests.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

CONCURRING:

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge